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# Corporate Excise DOR Directive 99-1

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## Determining whether a corporation is a tangible property corporation or an intangible property corporation under G.L. c. 63 §§ 30.10, 30.11; calculating net worth of intangible property corporations under G.L. c. 63 § 30.8 and 30.9.

### Introduction:

In two instances the corporate excise statute requires foreign corporations and domestic corporations to employ different formulas in determining their tax liability. Specifically, those are: (i) the determination of a corporation's status as a tangible or intangible property corporation, and (ii) the calculation of net worth for intangible property corporations. Some elements of these formulas were invalidated on federal constitutional grounds. *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995). In accordance with the decision in *Perini*, this Directive clarifies the method for determining whether a corporation is a tangible or intangible property corporation, and for calculating an intangible property corporation's net worth.

### Issues:

1. How should domestic and foreign corporations determine whether they are tangible or intangible property corporations under G.L. c. 63 §§ 30.10, 30.11?
2. How should domestic and foreign intangible property corporations calculate their corporate net worth under G.L. c. 63 §§ 30.8 and 30.9?

### Directive #1:

Domestic and foreign corporations are permitted to choose either of the two "Tangible or Intangible Property Corporation Classification" formulas from Schedule B of Forms 355A and 355B, for current and future taxable years, starting with the first tax year beginning after the date of this Directive. Thus, in making the determination of whether the corporation is a tangible or intangible property corporation, a domestic corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as the formulas are set out in G.L. c. 63 §§ 30.10, 30.11. Likewise, a foreign corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as set out in G.L. c. 63 §§ 30.10, 30.11. Corporations are permitted to make this choice annually.

### Directive #2:

Regardless of the formula they choose to determine their status as an intangible property corporation, domestic and foreign intangible property corporations are permitted to choose either of the two net worth formulas, from Schedule D of Forms 355A and 355B, for calculating tax liability for current and future taxable years, starting with the first tax year beginning after the date of this Directive. A domestic corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out in G.L. c. 63 § 30.9. A foreign corporation can choose either (i) the for-

mula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out in G.L. c. 63 § 30.9. In applying these formulas, a corporation may deduct from its net worth the value of any subsidiary as to which the 80% voting stock interest requirement of the statute is satisfied, regardless of where the subsidiary is organized or is doing business. Corporations are permitted to make this choice annually.

### Directive #3:

Corporations that would have benefited from the choice of formulas in this directive in prior tax years may be entitled to an abatement. Subject to the statute of limitations imposed by G.L. c. 62C § 37, corporations may apply for an abatement of taxes by using Form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

### Discussion of Law:

The corporate excise statute provides separate methods for determining the status of domestic and foreign corporations as tangible or intangible property corporations. G.L. c. 63 §§ 30.7, 30.8. Under the statute, tangible and intangible property corporations are taxed differently under the non-income measure of the corporate excise. See G.L. c. 63 §§ 32 (a)(1)(i), (ii), 39 (a)(1)(i), (ii). The formulas for determining tangible/intangible status are set forth in the forms and instructions for Schedule B of form 355A (Domestic Business or Manufacturing Corporation Excise Return) and Form 355B (Foreign Business or Manufacturing Corporation Excise Return).

Intangible property corporations are subject to a .26% tax on their net worth. G.L. c. 63 § 32 (a)(ii), G.L. c. 63 § 39 (a)(ii). The corporate excise statute provides separate formulas for calculating the net worth of domestic and foreign corporations. G.L. c. 63 § 30 (8), (9). Those formulas are set forth in the forms and instructions for Schedule D of Form 355A and Form 355B.

The Supreme Judicial Court, in *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995), struck down as unconstitutional some parts of the corporate net worth formulas of G.L. c. 63 § 30.8 and 30.9. Specifically, the court invalidated the portion of G.L. c. 63 § 30.8 that prevented a domestic corporation from deducting from its net worth the value of a subsidiary not incorporated in Massachusetts if the domestic corporation owned 80% or more of the voting stock of the subsidiary. The court also invalidated the portion of G.L. c. 63 § 30.9 that prevented a foreign corporation from deducting from its net worth the value of a subsidiary incorporated or doing business in Massachusetts if the foreign corporation owned 80% or more of the voting stock of the subsidiary. The forms and instructions for the corporate excise return forms were revised to conform to the holding in *Perini*.

This Directive further clarifies the corporate excise statute in light of pending constitutional challenges to the divergent statutory treatment of domestic and foreign corporations. Without acknowledging the legal merit of these challenges, the Commissioner will permit corporations to determine whether they are tangible or intangible property corporations using the statutory method for either domestic or foreign corporations, regardless of whether the corporation is domestic or foreign. Similarly, the Commissioner will permit such corporations to calculate their corporate excise using the statutory net worth formula for either domestic or foreign corporations.

Effective for its first taxable year beginning on or after January 1, 1999, a corporation may elect to use either the statutory formula for domestic or foreign corporations to determine whether the corporation is a tangible or intangible property corporation. The election is made by using Schedule B from either Form 355A or Form 355B on the return for that year. Likewise, effective for its first taxable year beginning on or after the date of this Directive, an intangible property corporation may elect to

use either the statutory formula for domestic or foreign corporations for calculating its net worth. The election is made by using Schedule D from either Form 355A or 355B on the return for that year.

Corporations that would have benefited in prior years from the choice of methods for determining their status as tangible or intangible property corporations, or from the choice of net worth formulas, may be entitled to an abatement. These abatements are subject to the statute of limitations set forth at G.L. c. 62C § 37. Corporations may apply for an abatement of taxes using form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.



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